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No. 94-340

In The Supreme Court of the United States

October Term, 1995

United Food and Commercial Workers Union Local 751,

Petitioner,

v.

Brown Group, Inc., d/b/a Brown Shoe Company,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED FOR REVIEW

Do Article III standing requirements preclude a federal court from giving effect to Congress' express statutory authorization permitting an exclusive "representative" of the "affected employees" to assert the monetary claims of the represented "affected employees" under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109.

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UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751,
Petitioner,
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BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

United Food & Commercial Workers Union Local 751 ("the Union") hereby petitions this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit in *United Food and Comm. Wrks. v. Brown Group*, 50 F.3d 1426 (8th Cir. 1995).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 50 F.3d 1426 (1995) and is reprinted in the appendix to this certiorari petition ("Pet. App.") at pp. 1a-12a. The Order of the Court of Appeals denying the Union's Petition for Rehearing and Suggestion of Rehearing En Banc is reprinted at Pet. App. 20a. The opinion of the United

States District Court for the Eastern District of Missouri granting defendant Brown Group, Inc.'s Motion to Dismiss is reported at 820 F. Supp. 1192 (1993) and is reprinted at Pet. App. 13a-15a. The opinion of the District Court denying the Union's Motion to Alter or Amend the Judgment is unreported and is reprinted at Pet. App. 16a-19a.

JURISDICTION

The Eighth Circuit issued its decision and judgment herein on April 3, 1995. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 25, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the Worker Adjustment and Retraining Notification Act ("WARN") provide:

§ 2(a)(4), 29 U.S.C. § 2101(a)(4):

> the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of Title 45.

§ 3(a), 29 U.S.C. § 2102(a):

> An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—
>
> (1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee . . .

§ 5, 29 U.S.C. § 2104:

> (a)(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who

> suffers an employment loss as a result of such closing or layoff for—
>
> (A) back pay for each day of violation at a rate of compensation not less than the higher of—
>
> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
>
> (ii) the final regular rate received by such employee; and
>
> (B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred. . . .
>
> * * *
>
> (5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.
>
> (b) The remedies provided for in this section shall be the exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have the authority to enjoin a plant closing or mass layoff.

STATEMENT OF THE CASE

The Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101-09, provides that covered employers may not order a "plant closing or mass layoff," as statutorily defined (29 U.S.C. § 2101(a)(2) & (3)), without providing notice sixty days beforehand "to each *representative of the affected employees* at the

time of the notice or, if there is no such representative at that time, to each affected employee." 29 U.S.C. § 2102(a) (emphasis supplied). "Representative" is defined in the statute as "an exclusive representative of employees within the meaning of section 159(a) or 158(f) of [the National Labor Relations Act (NLRA)] . . ."

WARN goes on to provide that: (a) if an employer "orders a plant closing or mass layoff in violation of section 2102," the employer is liable "to each aggrieved employee who suffers an employment loss" for back pay and benefits, (29 U.S.C. § 2104(a)(1)), and (b) "a person seeking to enforce such liability, *including a representative of employees* . . . aggrieved under paragraph (1) . . . may sue" in district court (29 U.S.C. § 2104 (a)(5) (emphasis supplied)).

On January 17, 1992, Brown Group, Inc. d/b/a Brown Shoe Co. ("Brown Shoe") mailed a written notice to William T. Treece of the United Food and Commercial Workers International Union ("International"), which announced that Brown Shoe's Dixon, Missouri plant would permanently close and 277 employees would be discharged as a result of the closing. Brown Shoe stated in the letter that the company would begin discharging employees on March 20, 1992. Brown Shoe already had begun discharging employees before sending the January 17 notice, discharged additional employees on January 20, 1992, and continued to discharge employees during February and March, 1992.

On June 16, 1992, United Food and Commercial Workers Union Local 751 ("Local 751" or the "Union"), petitioner herein, filed a complaint in the United States District Court for the Eastern District of Missouri, alleging that the Union was the "exclusive representative of the [Dixon] employees" on January 17, 1992 and at all other times material to the complaint as defined in WARN, 29 U.S.C. § 2101(a)(4). Jurisdiction was alleged under 28 U.S.C. § 1331 and 29 U.S.C. § 2104(a). A copy of the

then current collective bargaining agreement between Local 751 and Brown Shoe was attached to the complaint. The Union also alleged that it, not William Treece or the International, had a right to notice of the Dixon closing sixty days before the closing was ordered in accordance with 29 U.S.C. § 2102(a)(1), and that Brown Shoe had in any event failed to continue the employment of most of the represented employees for a sixty-day period following the notice. An appendix to the complaint identified those Dixon employees who are aggrieved employees under § 2104(a).

The complaint demanded that: (1) Brown Shoe pay each aggrieved employee back pay and fringe benefits for each day of employment loss the employee suffered prior to the expiration of the sixty-day notice period; (2) Local 751 recover from Brown Shoe the cost of this action, including reasonable attorneys' fees; and (3) Local 751 recover such other and further relief on its behalf and that of the aggrieved employees as may be proper.

On April 12, 1993, the District Court issued a memorandum and order granting Brown Shoe's motion to dismiss on the ground that the Union lacked standing to sue for damages for the represented employees. Local 751 thereupon filed a motion to alter or amend judgment asking leave to file an amended complaint seeking declaratory relief and adding affected individuals as parties. That motion was denied by the District Court on March 7, 1994.

On appeal, the Eighth Circuit affirmed the District Court's standing ruling. The Court of Appeals recognized that the UFCW is a statutory "representative" of the aggrieved employees. But the Court held that while the Union "is entitled to bring suit under the WARN Act, [] it does not necessarily follow that the union has standing." Pet. App. 4a.

The Court of Appeals went on to hold that although the failure to provide an adequate, timely notice *to the*

Union, as required by the statute, may "allege[] an injury to the union itself . . . that is concrete and actual" (Pet. App. 6a), the Union does not have direct standing. The statutory remedy for inadequate notice—back pay and benefits for aggrieved employees—said the Eighth Circuit, "would do nothing to remedy the alleged failure of notice to the UFCW." Pet. App. 7a. The Eighth Circuit went on to deny the Union standing to assert the right of the employees the Union represents to monetary relief, relying on the third prong of the associational standing test articulated in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)—*viz.*, whether "the claim asserted [or] the relief requested required the participation of the individual members in the lawsuit." Pet. App. 11a. Finally, the Court of Appeals affirmed the district court's denial of leave to amend the complaint. Pet. App. 12a.

REASONS FOR GRANTING THE WRIT

The five courts of appeals—other than the court below—in which a case has been litigated by a union seeking monetary relief for the employees the union represents to redress an employer violation of the Worker Adjustment and Retraining Notification Act, have proceeded on the understanding that WARN provides for—and the Constitution permits—such suits, have exercised jurisdiction over the case, and have reached the merits.

This Court, after noting the question of the union's standing in oral argument, did the same last year in *North Star Steel Co. v. Thomas*, —— U.S. ——, 115 S.Ct. 1927 (1995). *North Star Steel*, the first WARN litigation to come to this Court, involved two consolidated cases, one of which, like this case, was brought by a union seeking to recover the applicable statutory monetary relief for the employees the union represented. *See United Steelworkers of America v. Crown Cork & Seal*

Co., 32 F.3d 53, 55 (3d Cir., 1994) affirmed *sub nom. North Star Steel Co. v. Thomas, supra.*[1]

The Eighth Circuit has now gone the other way and has invalidated Congress' determination to provide for these WARN suits by unions on the theory that this statutory cause of action offends the Constitution's "standing" rules. The constitutional standing question thus raised is both a recurring one—necessarily arising in numerous WARN cases—and one that goes to the heart of the WARN statutory scheme as a whole. Since *North Star Steel*'s approach and result evince this Court's understanding that WARN suits by unions are a proper part of the statutory scheme, the Eighth Circuit's contrary determination warrants immediate review to clarify the law in this regard.

The Eighth Circuit's constitutional ruling, moreover, raises a fundamental and recurring separation of powers issue. There are a number of federal statutes that provide for litigation by a representative designated by statute who is empowered to seek monetary relief on behalf of particular individuals. This Court has proceeded on the

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[1] At oral argument in *North Star Steel*, the question of the union's standing in that case was posed by Justice O'Connor to the union's counsel (who also represents the Union in this case):

> *Mr. Gold*: . . . . Here, we're dealing with a mandatory wage standard or labor standards statute that generates a quite straightforward damages action for failure[] to act, and only a straightforward court damage action.
>
> *Question*: Why does the union have standing to challenge it, Mr. Gold?
>
> *Mr. Gold*: The statute is quite clear in giving the union standing, associational standing to seek such liability, and that is the basis. We believe that Congress in this kind of situation plainly has the constitutional authority to provide such associational standing. . . . I would emphasize, I know that it is not waivable, that the standing issue is not one that to this point has been pursued. It may well be the subject of a petition some day. [1995 WL 301715, Oral Argument, at p. 11.]

This is that petition.

premise that this approach is valid but has done so in passing and without exploring the constitutional standing issues raised in any depth. The Eighth Circuit's decision crystalizes these issues and presents a compelling reason for their resolution.

The question of whether Article III limits Congress' *legislative* power to determine whether a representative may prosecute an action for monetary relief on behalf of individuals who have suffered injury in fact, and if so, under what circumstances, raises a most basic and sensitive issue concerning the relationship between Congress and the federal courts. The federal courts "have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia*, 6 Wheat. 262, 404 (U.S. 1821) (Marshall, C.J.). Whether Congress' law-making powers are to be restricted on the view of the constitutional standing requirement adopted below is therefore a quintessential question for this Court to decide.

Given the nature of the question presented here and of the background law, in the balance of this petition we develop two points.

First, Congress in crafting WARN expressly determined that employer violations of the requirement that plant closing/mass layoff notices are to be provided to unions designated by a group of employees as their exclusive representative can be met by a suit by the union against the employer and that the union in such a suit can seek monetary relief payable to the represented employees on account of the violation. Such suits are, indeed, at the very heart of the statutory enforcement scheme. Congress' intent to provide for WARN cases of the kind the Union brought here, in other words, could not be more clear. Thus, the decision below that Congress cannot, consistent with Article III's standing requirements, enact such a cause of action is a direct frontal attack on Congress' Article I legislative powers. Pp. 9-14, *infra*.

Second, the Eighth Circuit's constitutional ruling rests on the assumption that for the purposes of the standing doctrine, a case in which Congress has determined that a person that has a representational status is to be empowered to bring suit seeking monetary relief payable to the individuals that person represents is on all fours with a case in which Congress has made no such determination and the person bringing suit is proceeding under some general heading of jurisdiction. That assumption is contrary to this Court's overall "standing" jurisprudence, which distinguishes between "constitutional" standing requirements and "prudential" standing requirements and which recognizes that "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' . . ," (*Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). The result reached below moreover, puts into question many statutory and common law schemes analogous to that provided for in WARN. Indeed, to take the analogy closest to hand, the Court of Appeal's constitutional ruling cannot be squared with this Court's decision in *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) which recognizes union suits to redress employer violations of collective bargaining agreements in which the union seeks monetary relief on behalf of the adversely affected employees.

At the same time, there is no case in this Court squarely treating with Congress' constitutional authority to provide for suits by a representative for individual monetary relief of the kind at issue here. And, the court of appeals law is neither clear nor consistent. The importance of this constitutional issue and the absence of an authoritative ruling directly in point underline the need for review of this case by this Court. Pp. 14-24, *infra*.

1. "The inquiry as to standing must begin with determination of whether the statute in question authorizes

[the remedy sought] at the behest of the plaintiff." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *see also Primate Protection League v. Tulane Ed. Fund*, 500 U.S. 72, 77 (1991), *quoting* Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 229 (1988) ("standing is gauged by the specific common-law, statutory or constitutional law claims that a party presents [and] 'should be seen as a question of substantive law, answerable by reference to the statutory . . . provision whose protection is invoked.' ").

Last term, in *North Star Steel*, the Court began by explicating as follows the basic scheme of the statute at issue here:

> With some exceptions and conditions, WARN forbids an employer of 100 or more employees to "order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. § 2102(a). The employer is supposed to notify, among others, "each affected employee" or "each representative of the affected employees." 29 U.S.C. § 2102(a)(1). An employer who violates the notice provisions is liable for penalties by way of a civil action . . . . The class of plaintiffs includes aggrieved employees (*or their unions as representatives*), *ibid.*, *who may collect* "*back pay* for each day of violation," § 2104(a)(1)(A), "up to a maximum of sixty days," § 2104(a)(1). [115 S. Ct. at 1929, emphasis supplied].

This explication reflects the Court's understanding that unions can sue under the WARN Act, and in such suits can obtain statutorily-defined monetary recoveries for individual represented employees.

(a) Not surprisingly, this Court's description of the statutory enforcement provisions in *North Star*, brief though it is, accurately summarizes the statutory scheme. WARN was enacted in 1988, long after the federally-regulated system governing collective bargaining was in

place, to provide limited statutory rights concerning plant closings and mass layoffs, actions which effectively terminate the employees' employment tenure and any collective bargaining agreement entered into on the employees' behalf by their exclusive representative. Congress determined that where the workforce has chosen an exclusive bargaining representative pursuant to the procedures provided by the National Labor Relations Act (NLRA) or Railway Labor Act (RLA) and a closing or mass layoff occurs, the protection of employee interests should continue to be entrusted to the statutory representative otherwise responsible for representing the employees with regard to their employment.

WARN therefore defines "representative" as the exclusive representative chosen by employees pursuant to the National Labor Relations Act or Railway Labor Act. Such exclusive representatives are ordinarily "designated or selected . . . by a majority of the employees in a unit appropriate for . . . the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." NLRA § 9(a), 29 U.S.C. § 159(a); *see also* RLA § 2, *Fourth*, 45 U.S.C. § 152, *Fourth*.[2] And, such exclusive representatives owe the represented employees a duty of fair representation, similar to the duty of a fiduciary or trustee. *Conley v.*

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[2] The process for designating the exclusive representative is provided for by statute and administered by the National Labor Relations Board (and, in the case of the RLA, by the National Mediation Board.) NLRA § 9, 29 U.S.C. § 159; RLA § 2, *Ninth*, 45 U.S.C. § 152. *Ninth*. It is an unfair labor practice under the NLRA for an employer to recognize as exclusive representative a union that has *not* been selected by the majority of the employees (NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2); *see also* RLA § 152, *Third* and *Fourth*). Under NLRA § 8(f), 29 U.S.C. § 158(f), in the construction trades a union can be recognized as the exclusive representative before the union is designated by a majority of the particular employee group, but the employees may petition at any time for an election of an exclusive representative under § 9(a). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982).

Gibson, 355 U.S. 41, 42 (1957); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

Congress then provided in WARN that employees who have a "representative" should receive the statutory notice of a plant closing or mass layoff *through notice to that representative*, rather than through notice to each employee individually. 29 U.S.C. § 2102(a)(1). Where the employer does not meet the obligation to provide sixty-days notice to the union, Congress provided that the employer, for "violation of section 2102," shall be liable for back pay and benefits to "each aggrieved employee" (29 U.S.C. § 2104(a)(1)), and expressly pretermitted all other remedies for failure to provide notice to the union (29 U.S.C. § 2104(b)). And, the statute provides in terms how "*such liability*"—plainly referring to the very liability just described—shall be calculated (29 U.S.C. § 2104(a)(1)), and how "*such liability*" can be enforced in court, *inter alia*, by "a representative of employees aggrieved under paragraph (1)" (29 U.S.C. § 2104(a)(5)).

The net effect of this scheme, as this Court stated in *North Star Steel*, is to provide for "*penalties* by way of a civil suit" (115 S. Ct. at 1929, emphasis supplied), with the penalties payable to the represented employees rather than to the representative, but with the representative empowered to seek those "penalties" to vindicate *the representative's own statutory right to receive notice.*

(b) Following the express statutory permission, unions acting as exclusive representatives have filed a large proportion of the cases thus far litigated under WARN. And, as we have already noted, the five courts of appeals—other than the court below—faced with union suits under WARN seeking the statutory penalties due represented employees have exercised jurisdiction and reached the merits of the WARN issues raised. *Crown Cork & Seal, supra* (3d Circuit); *United Paperworkers International Union v. Specialty Paperboard, Inc.*, 999 F.3d 51 (2d Cir. 1993); *International Union, United Mine Workers v. Jim Walter Resources*, 6 F.3d 722 (11th Cir. 1993); *United Mine Workers v. Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994); *International Bhd. of Teamsters v. American Delivery Service Co.*, 50 F.3d 770 (9th Cir. 1995); *International Alliance of Theatrical & Stage Employees v. Compact Video Services, Inc.*, 50 F.3d 1464 (9th Cir. 1995).[3]

Under the Eighth Circuit's holding in this case, each of these cases should have been dismissed in their entirety for lack of standing, whether the standing issue was raised by the parties or not. *National Organization for Women, Inc. v. Scheidler*, —— U.S. ——, 114 S. Ct. 798, 802 (1994). The result reached below is therefore in direct conflict with the results reached by five other courts of appeals.

The standing holding below is not only at odds with the result reached by these other circuit courts but is also at odds with the intricate scheme Congress created for enforcing the WARN Act. The Eighth Circuit was of the view that only the affected employees could bring suit for the statutory liability prescribed where the requisite notice is not provided. *But where the employees have chosen union representation, that notice is due to the employees' representative, the union, not to each of the employees directly.* Individual employees, therefore, may not be aware whether or not any notice was provided, or,

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[3] A few district courts have directly addressed the standing issue; all except the district court that decided this case have concluded that there is standing. *See United Mine Workers v. Helen Mining Co.*, 9 IER Cases (BNA) 588 (W.D. Pa. 1994); *United Steelworkers v. Keller Industries* (No. TH 92-21-G S.D. Ind. Sept. 21, 1994) (finding standing); *New Orleans Clerks v. Ryan-Walhs, Inc.*, 9 IER Cases (BNA) 391 (E.D. La. 1994) (finding standing); *United Mine Workers of America v. Florence Mining Co.*, 855 F. Supp. 1466 (W.D. Pa. 1994) (finding standing); *Contra Amalgamated Clothing & Textile Workers Union v. Brown Group, Inc.*, 879 F. Supp. 1015 (E.D. Mo. 1993).

if provided, whether the notice provided met the statutory requisites regarding timing, content, and recipient.

In this case, for example, the employees laid off before March 20, 1992, as part of the plant closing announced in the purported WARN notice in January, would not necessarily be aware that their layoffs were in violation of the employer's statutory notice obligation, since the notice was provided only to a union representative (albeit, the complaint maintains, the wrong one). Under the Eighth Circuit's ruling, the Union, the entity to whom the statutory duty is directly due, cannot sue, since the statute in terms makes the monetary remedies provided in § 2104 "the exclusive remedy for any violation of this chapter." 29 U.S.C. § 2104(b). And, the individuals who can sue are not owed the required statutory notice, and may not even be aware of whether there has been a statutory violation to redress.

The holding below, consequently, implicates not only *who* can bring suit for the statutory penalties due employees under the WARN Act, but, as a practical matter, whether anyone can. And, since WARN itself limits the available remedies *other* than the statutory penalties due employees, the decision below goes far to make WARN a dead letter in union-represented workplaces.

2. The Court of Appeals in this case began from the premise that Congress' power to establish a scheme by which a representative is expressly authorized to represent the interests of individuals in litigation is to be judged by the same criteria that apply where there has been no statutory designation of such a representative for the purposes of litigation. That premise is unsound.

The Court has gone to pains to explain the distinction between constitutional and prudential rules of standing, and the consequences of that distinction for purposes of determining the authority of Congress to structure statutory remedial schemes. In *Warth v. Seldin*, 422 U.S. 490,

499 (1975), the Court began its standing discussion by stating:

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. . . . A federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action." [citations omitted].

Warth then added:

> Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. . . . [One of these self-imposed, prudential limitations is that] even when the plaintiff has alleged injury sufficient to meet the "case or controvery" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interest. . . [*Id.*]

See also Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).[4]

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[4] Most of this Court's standing cases have involved suits contesting governmental action, and have developed standing criteria that serve to delimit the role of the judiciary with regard to other governmental entities. *See, e.g., Warth v. Seldin*, 422 U.S. at 500 ("Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (where Congress confers statutory standing, "it is clear *that in suits against the government at least*, the concrete injury requirement must remain.") (emphasis added). Whether such limitations apply equally where, as here, there is a dispute between purely private parties and therefore no possibility of judicial interference in the determinations of other governmental entities is itself a question of substantial import raised by this case. A strong argument can be

Statutory considerations can affect the standing inquiry in either of two ways. First, statutes can affect the minimum, Article III injury-in-fact requirement, by "creating legal rights, the invasion of which creates standing." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Warth v. Seldin*, 422 U.S. at 500; *Havens Realty v. Coleman*, 455 U.S. 363, 373 (1982).

Second, statutory grants of authority to litigate a particular dispute "assume[] critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes." *Warth v. Seldin*, 422 U.S. at 500.

In particular, where the Article III injury-in-fact minima are met, "the question whether the litigant is a 'proper party to request an adjudication of a particular issue', *Flast v. Cohen*, 302 U.S. 83, (1968) is one within the power of Congress to determine." *Sierra Club v. Morton*, 405 U.S. at 732; *see also Gladstone Realtors v. Bellwood*, 441 U.S. at 100 ("Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' . . .")

It is precisely because it ignored this Court's teachings regarding Congress' authority to confer litigating authority on persons who might be barred by prudential standing principles absent that statutory authority, that the Eighth Circuit's standing analysis in this case is trebly flawed.

(a) First, the opinion below errs by assuming that Congress cannot, by express action, permit an association

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made that separation of powers considerations counsel broad deference to Congress' determinations concerning the most appropriate litigant to vindicate statutory rights where there are no competing considerations concerning the relationship between various governmental bodies.

to represent its members' interests when the relief sought is individual monetary damages.

The Court of Appeals viewed the authority conferred upon the Union under WARN § 2014(a)(5) to seek to enforce the employer's liability to aggrieved employees as one derived from the Union's associational relationship with its members. Pet. App. 8a-9a, citing *International Union, UAW v. Brock*, 477 U.S. 274, 281 (1986). *Brock*, based on an earlier associational standing case (*Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)), applied a three-part standard governing associational standing to determine whether a union could bring a suit on its members' behalf.

The Eighth Circuit recognized that the first two prongs of the *Hunt* standard are met here: The represented employees themselves have been injured in fact by the employer's failure to provide the statutory recompense for inadequate notice, since the statute specifies that the statutory penalty is to be measured by their loss in pay and benefits, and that the penalty is to be paid to them. And, protecting the represented employees' interests in the event of a plant closing or mass layoff is "germane" (*Hunt*, 432 U.S. at 343) to the Union's purpose.

The Eighth Circuit's representational standing holding thus rests on the third prong of the *Hunt* standard. Because individual monetary damages were being sought, the court below concluded, "the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343, cited at Pet. App. 11a. But neither *Hunt* nor *Brock* arose in a context in which the statute designated an association as a statutory representative for the purposes of securing for its members who have been injured in fact monetary relief. And, the Eighth Circuit simply passed by the question of whether this third aspect of the *Hunt* standard is one dictated by the Article III "case or controversy" requirement, such that Congress cannot consistent with the Constitution

make such an express designation, or an aspect of the prudential standing law.

The general standing principles outlined above, however, lead to the conclusion that the third *Hunt* prong is *not* part of the bedrock injury-in-fact Article III requirement. The associational standing cases do *not* create an exception to the rule requiring actual injury to the claimant, but rather rest on a recognition that in certain circumstances the relationship between two potential litigants—such as a relationship in which one has undertaken to represent and protect the others' interests—is such that an injury to one *is* an injury to the other. As such, associational standing recognizes one of a "variety of circumstances, both traditional and modern, [in which] a party is permitted to appear in court as a formal representative of other interests. Trustees, guardians and personal representatives are familiar examples." Wright, Miller & Cooper, 13 *Federal Practice & Procedure* § 3531.9 at 627 (West 1984).

The first *Hunt* requirement—which requires that there must be the requisite concrete injury to *someone* to assure that the case is one in which the judicial power can be exercised with sufficient focus and specificity—is, to be sure, part of the constitutional standing inquiry. *See Flast v. Cohen*, 392 U.S. 83, 99-100 (1968). And, the second "germaneness" prong ascertains whether it is appropriate to regard an association as a surrogate for the injured individual in forwarding the individual's interests, and may well be part of assuring compliance with the constitutional "case or controversy" dictate as well.[5]

[5] As we develop below, this prong of the *Hunt* test should apply only when the association is in essence a volunteer as a representational litigant. Where the legislature or a common law doctrine *appoints* an organization as a representative of others for purposes that include litigation, the legal determination of representational status should control, with no need to inquire into the organization's internal purposes or contractual understanding with its members.

The third *Hunt* requirement, however, is one that relates to efficient judicial management of a volunteer associational suit, evidencing a *prudential* concern that in the absence of Congressional or other guidance, the courts would have to engage in judicial legislation to determine whether a given self-appointed representative is sufficiently responsive to the interests of individual members to assure that the interests of each such individual are protected.

At the same time we recognize that the courts of appeals are of two minds as to whether the third *Hunt* prong has a constitutional law or a prudential base. *See National Treasury Employees' Union v. United States Merit Systems Protection Board*, 743 F.2d 895, 910 (D.C. Cir. 1984), citing *National Treasury Employees' Union (NTEU) v. Campbell*, 589 F.2d 669, 679 (D.C. Cir. 1978) (if Congress so provides, "NTEU has standing to bring suit on behalf of its injured members for . . . . damages challenging rates negotiated by the Civil Service Commission for federal employees' health insurance"); *compare National Association of Realtors v. National Real Estate Ass'n*, 894 F.2d 937, 941 (7th Cir. 1990) (suggesting that Congress can through statutes create legal rights which support standing, but cannot authorize an association to bring a damage action on behalf of its members). *See also Telecommunications Research v. Allnet Communications Servs., Inc.*, 806 F.2d 1093, 1096 (D.C. Cir. 1986) (citing *NTEU v. Merit Systems Protection Board* and refusing to establish a *per se* rule that associations may never represent their members in actions for direct monetary relief, because in some instances the association may "possess[] a special representational responsibility to the members on whose behalf it sues"); *id.* at 1098 (Bork, J., concurring) (suggesting that "a special representational responsibility" could confer standing upon an association to collect monetary relief for statutory violations of its members' rights if there is a "direct statutory provision" that "confer[s] standing upon an association.");

Kansas Health Care Ass'n v. Kansas Department of Social and Rehabilitation Servs., 958 F.2d 1018, 1022-23 (10th Cir. 1992) (finding that, applying the *Hunt* test, the Kansas Health Care Association lacked standing to litigate a particular case because of the need for individual participation, but characterizing its holding as one based on a "prudential concern . . . related to standing" rather than on a constitutional requirement).

It is also very much to the point that so far as we have been able to ascertain this Court has never squarely ruled on whether the third *Hunt* prong is an expression of the constitutional standing law or the prudential standing law. The resulting uncertainty and its manifestations in the lower court cases support the grant of *certiorari* here.

(b) The Eighth Circuit's analysis of the Union's standing in this case errs, secondly, by assuming that the associational standing doctrine as stated in *Brock* and *Hunt* is fully applicable to a situation, such as the one here, where Congress has prescribed detailed procedures for appointing an entity as the representative of the interests of a class of individuals. That assumption, we submit, is as unsound as the Eighth Circuit's assumption that the third *Hunt* prong *is* part of the constitutional standing law.

As we have noted, in a variety of circumstances, statutory and common laws designate one individual or entity as a representative of another's interests for purposes of litigation. This Court has generally proceeded on the understanding that an entity appointed in accord with procedures or standards established under common law, statute, or decisional law as the representative of another, with express authority to represent that person's interests in court, may consistent with the Constitution appear as a litigant. *See, e.g., Director, Office of Workers' Comp. v. Newport News*, —— U.S. ——, 115 S. Ct. 1278, 1286 (1995) & cases cited (Congress can confer standing upon governmental entities by appointing them as

statutory representative for the compensation or other monetary interests of individuals, "without infringing Article III of the Constitution"); *General Telephone Co. of the Northwest, Inc. v. Equal Employment Opportunity Comm'n.*, 446 U.S. 318, 324 (1980) (the Equal Employment Opportunity Commission has standing to bring suit in its own name to recover backpay for a group of individual discrimnatees); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (Secretary of Labor permitted, as statute provides, to pursue claims for monetary relief for individuals for violation of the Fair Labor Standards Act); *Hodel v. Irving*, 481 U.S. 704, 711-12 (1987) (noting that the Secretary of the Interior is the designated statutory representative for a decedent Indian's surviving claims);[6] Wright, Miller & Cooper, 13 Federal Practice and Procedure § 3531.9, p. 627 (permitting formal representatives such as trustees, guardians, and personal representatives to appear in court to protect the interests of those they represent raises no standing issues worthy of discussion); *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (third party representation permissible where the standards under the common law "next friend" doctrine are met).[7]

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[6] To be sure, the run of the federal statutory examples involve representation by governmental entities. But no reason appears why, *for Article III purposes*, the distinction between public and private representatives is a distinction of legal substance. Whether the representative is a private entity appointed in accord with legislatively determined standards or a part of the executive branch, the entity is forwarding the interests of others; may be representing a group of individuals in a single lawsuit, with the need to represent their diverse interests at the relief stage if not earlier; and is invested with some governmental assurance of adequacy of representation.

[7] The cases in which such legal representatives have been allowed to appear without raising third-party standing questions of constitutional dimension are, of course, legion. In a closely analogous case in which the standing issue *was* actually discussed, the Eleventh Circuit asserted that Congress can develop standards permitting one person or entity to sue on another's behalf without

Here, "the union is no mere volunteer whose representation of others must be checked for adequacy. . . . The labor union has already been certified by a neutral government agency as the "exclusive representative" of the bargaining unit employees." *Office & Professional Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 67 (1992) (citation omitted) (R. Ginsburg, J.).

Under these circumstances, the standards and procedures established by Congress to assure representational fidelity should be enforced, without appending a separate judicial inquiry applicable where there has been no such Congressional action. And, this should be the case whether the representative in question is an organization or an individual or a corporation.

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transgressing its constitutional authority. *See Erkins v. Bryan*, 663 F.2d 1048, 1051 (11th Cir. 1981), *cert. denied*, 454 U.S. 989 (1982) (29 U.S.C. § 501(b), permitting a "member" of a union as statutorily defined to represent the union's interests "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization" to do so without any personal stake in the outcome of the litigation, since the statute says that she may); *see also United States ex rel. Kreindler & Kreindler v. United Technologies Corporation*, 985 F.2d 1148 (2nd Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 2962 (1993) (federal *qui tam* statute, permitting a citizen to sue to recover for monetary damages caused the government through fraudulent claims, is valid under Article III because the statute effectively assigns the government's claims to qui tam plaintiffs); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994) (same).

The Seventh Circuit, however, in *National Association of Realtors v. National Real Estate Ass'n, supra*, reads *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho), *aff'd per curiam*, 454 U.S. 1025 (1981) as establishing a broad principle that Congress may not authorize someone whose rights have not been directly invaded to sue concerning an invasion of someone else's right (894 F.2d at 941; *see also Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990)). *McClure*, however, did not involve a situation in which an individual was statutorily appointed to represent the rights of particular individuals who had suffered injury in fact, but, instead, the designation of an individual with no cognizable legal injury to sue regarding an abstract legal question.

Whether we are correct in that conclusion or not, the general considerations concerning the degree to which Article III constrains Congress in providing for representational litigation where the designation of the representative is governed by statutory standards and procedures to assure adequacy of representation is a second constitutional standing question raised by the Eighth Circuit opinion upon which the lower courts need further guidance.

(c) Finally, the Eighth Circuit's standing analysis is irreconcilable with the cases of this Court recognizing that Congress *can* confer standing upon a litigant to pursue another party's legal interests as long as the *litigant itself* has suffered a cognizable legal injury due to the defendant's action.

Under WARN, the Union *itself* has a statutory right to notice, here violated according to the complaint, and has that right as part of its overall representational role with regard to the employees' employment-related interests under the federal labor laws. The court below so recognized, but viewed any direct injury to the Union as distinct from its representational status, and held that the Union lacks standing to redress its direct injury because the statutory penalty inures not to the Union's own treasury but to the represented employee's personal account. Pet. App. 6a-7a.

This analysis disregards yet again the distinction between constitutional and prudential standing principles, and disregards as well the authority of Congress to legislate so as to override those standing principles erected by the Court purely as a matter of judicial self-restraint. In particular, this Court's cases make clear that "so long as this [Article III 'distinct and palpable injury'] requirement is satisfied, a person to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others. . ." *Warth v. Seldin*, 422 U.S. 501. And, in *International Union, UAW v. Hoosier*

Cardinal Corp., 383 U.S. 696, 699-700 (1966), the Court expressly held that unions *may* sue for damages *for represented employees* where the collective bargaining agreement negotiated by the union has been infringed, reading § 301(b) of the Labor Management Relations Act, 29 U.S.C. § 185(b), to so permit.

Here, the Union's right infringed is statutory rather than contractual. But the distinction between violation of self-created norms and violation of Congressionally prescribed norms is of no moment to the standing analysis. Rather, here, as in *Hoosier Cardinal*, the Union *itself* suffered an injury damaging to the Union's role as exclusive representative—there, breach of an agreement negotiated as representative, here failure to receive notice due it as representative. No reason appears why it is more appropriate in one instance than in the other to permit a union that has in fact suffered cognizable legal injury to vindicate that injury by forwarding the employment-related interests of represented employees, where—as here and as in *Hoosier Cardinal*—*Congress expressly so provides.* The logic of the situation is that the authority of Congress, recognized in *Hoosier Cardinal*, to permit unions to seek individual monetary relief for the employees the union represents as a means of vindicating the union's *own* legal rights is not limited to contractual cases but extends to violations of statutory requirements as well.

In sum, the Eighth Circuit's standing holding merits review both because of its potential impact on WARN litigation and because it raises three interrelated, substantial questions concerning Congress' power, consistent with Article III, to shape statutory remedial schemes by providing for representational litigation.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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